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IN THE

Supreme Court of the United States

October Term, 1965

No. 839

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION
Petitioner

vs.

JOSEPHINE MESSINA
Respondent

PETITIONER'S REBUTTAL TO RESPONDENT'S REPLY BRIEF TO PETITION FOR CERTIORARI

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Not merely to have the last word, but by noting the chief distortions of the case rulings cited by the Respondent in her brief, the Petitioner seeks to aid the Court in passing upon the justification for the writ of certiorari requested herein. Within the few following pages the manner in which the Respondent has begged the federal questions raised in the petition will also be demonstrated.

I CONFLICT OF LAW RE APPARENT AUTHORITY OF GOVERNMENT OFFICER.

The first federal question discussed by the Petitioner in its brief was the holding of the courts below of the supposed apparent authority of a government officer (as distinct from actual authority) to bind MATS in contract for an air taxi flight; the one purchased by the insured herein which proved fatal.

A document alleged by the Respondent to be a MATS contract for the said flight is held to make the Petitioner liable to the Respondent. Neither the Respondent nor the Petitioner is a party to the alleged contract. Yet the Petitioner, according to the Respondent, cannot be heard to deny the alleged government officer's actual authority to bind MATS!

This absurd hypothesis is allegedly supported by the cited *Merrill* decision in which even the dissenting Mr. Justice Jackson did not subscribe to the glibly quoted "one way street" notion at all.

Similarly, this Court's holding in the *Perkins* case was incorrectly described by the Respondent. Therein, standing was denied to a party who was merely contemplating contractual relations with the government; not to a party who had engaged in any such relations either directly or indirectly.

II. THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The gratuitous manner in which the courts below injected and passively approved the appellation "ambiguous" to three words in the policy was the second basis for the Petitioner's asking this Court to grant it a hearing.

These words were "regular, special or chartered" and were descriptively applied to six specific types of flights

enumerated immediately thereafter as included, not excluded, in the coverage.

Without attempting to resort to any recognized rule of construction to relieve an injustice that might be worked by such words, the policy was in effect rewritten *sub silentio*.

The propriety of this blatant departure from the accepted and usual course of judicial proceedings, raising another federal question, is completely ignored in the Respondent's brief. Petitioner can only trust that its request to this Court, in the exercise of its supervisory capacity over the courts below to correct this deviation, will not fall on equally deaf ears.

III. THE NATIONAL AND CONTINUING IMPORTANCE OF THE CASE.

As if to imply that this case is of no national importance, the rewriting by the courts of this popular and clearly stated insurance policy which she had not even alleged to be ambiguous, the Respondent, without any delineation, cites *Griffin v. U.S.* A reading of this decision however merely reveals that it upheld the right of the Circuit Court to formulate rules of evidence for the District of Columbia. *Fisher v. U.S.*, similarly cited, also pertained merely to a rule of peculiarly local concern.

As in *DelVecchio v. Bowers*, a workman's compensation decision, which this Court reviewed because its construction constituted a precedent of general application, Petitioner feels that this Court will likewise recognize the instant case as one of national concern.

The "quite simple" reason Respondent advances for the courts below not considering the actuarial factors has no support in its findings. As observed by the dissenting judge, however, it is within the scope of judicial notice that the obviously greater risks of the relatively unregulated non-scheduled air taxis is not offset by their

observance of a few safety standards which exceed F.A.A. requirements for heavier planes. A small plane naturally must approach a landing field from a higher altitude than a four-engine airliner; the former needs the greater altitude for adequate vision. At the same level its vision could not be equated with its larger brother due to its less comparable instrumentation.

IV. THE COURT'S INVOCATION OF A TRANSCENDENTAL BODY OF LAW OUTSIDE OF ANY PARTICULAR STATE.

In reply to this fourth federal question raised by the Petitioner, the Respondent resorts to another so-called short answer. She contends that the Petitioner has never demonstrated that the application of Japanese law would change the outcome.

This not only begs the question, but in trying to avoid the burden of proving her right to recover under the law of any jurisdiction overlooks the holding below that is in conflict with the decisions of this Court in *Klaxon*, cited in Petitioner's brief, which condemned the making of an independent determination of such a question without first regarding local law.

The rulings of this Court in *Erie v. Tompkins*, *West*, and *Huddleston*, requiring federal courts to ascertain and apply the state law which controls, have been violated herein. True, this Petitioner has not argued that Japanese law applies. Neither has it argued that the law of California where the fatality occurred, or Maryland, the Respondent's domicile, or the District of Columbia where the suit was brought, applies. It has merely maintained that the law of some country or state should be followed.

Petitioner does not contend that there must be "uniformity or consistency among the conflict of laws rules adopted by the various lower courts," nor does it contend the lower courts "erred in ruling that Japanese law need not be applied." The Petitioner does contend however

that (a) the courts below erred in failing to ascertain which substantive law was applicable, and (b) that the courts erred in applying a federal general common law, denominated "American contract law" rather than the law of a particular state or foreign country.

Respondent correctly asserts that there need by no uniformity or consistency among the conflict of laws rules adopted by the various lower courts. Indeed, no uniformity is possible since federal courts are bound to follow the conflict of laws rules of the forum. That, however, is exactly what was not done here, which raised the same federal question as in *Klaxon*. The Respondent's quotation from *Wells*, taken out of context, is misleading in that it fails to recognize therein the minimum standards that this Court insisted be observed. Those same minimum standards were ignored herein; namely, by totally disregarding any conflict of laws rule and by completely failing to ascertain the appropriate applicable body of substantive law.

In conclusion, the Circuit Court below failed to correct and thereby impliedly sanctioned a course of proceedings which was prohibited by this Court in *Erie v. Tompkins;* namely, an independent view by the federal courts of the substantive law to be applied. Considering the four major federal questions raised herein, it is little wonder that the dissenting judge protested this affirmance of a judgment of the District Court "without undertaking any analysis of the issues." The determination of the appropriate law becomes especially critical in a case such as this wherein the forum had no contact with either of the parties, or the policy sued on, other than being the locus in which the suit was brought.

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